

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:	)	CHAPTER 11
	)	
WORLDCOM, INC., <i>et al.</i> ,	)	CASE NO. 02-13533 (AJG)
	)	
Debtors.	)	(Jointly Administered)

**ORDER DENYING DEBTORS' MOTION FOR ORDER  
NUNC PRO TUNC REJECTING AGREEMENT**

This cause coming to be heard on the Debtors' Motion for Order Nunc Pro Tunc Rejecting Agreement Between WorldCom, Inc. and Kennedy and Associates (the "Motion"), the Court having considered: (i) the Motion; (ii) Kennedy & Associates, Inc.'s Objection to the Motion ("Response"); (iii) Debtors' Reply to the Response; and (iv) argument of respective counsel for Kennedy & Associates, Inc. and the Debtors, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that the Motion is denied for the reasons stated in open court on February 28, 2006, as fully transcribed in Exhibit A, attached hereto; and

IT IS HEREBY FURTHER ORDERED that a status conference on Kennedy & Associates, Inc.'s claim and Debtors' objection thereto is scheduled for April 25, 2006 at 10:00 a.m.

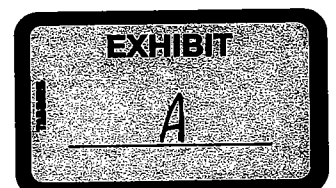
DATED: \_\_\_\_\_, 2006  
New York, New York

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Honorable Arthur J. Gonzalez,  
United States Bankruptcy Judge

## **Exhibit A**

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3 AS CORRECTED AND MODIFIED BY THE  
4 COURT ON 2/28/2006  
5 UNITED STATES BANKRUPTCY COURT  
6 SOUTHERN DISTRICT OF NEW YORK  
7 -----x  
8 In re  
9 Case No.  
10 WORLDCOM, INC., et al, 02-13533  
11  
12 Reorganized Debtors.  
13 -----x  
14 February 28, 2006  
15  
16 United States Custom House  
17 One Bowling Green  
18 New York, New York 10004  
19  
20 E X C E R P T  
21  
22 10:05 02-13533 WORLDCOM, INC., ET AL  
23 DECISION TO BE RENDERED  
24  
25 Motion filed by the Debtors for an order nunc  
pro tunc rejecting agreement between  
WorldCom, Inc. and Kennedy & Associates.  
Response by Kennedy & Associates, Inc. filed.  
B E F O R E:  
THE HONORABLE ARTHUR J. GONZALEZ  
United States Bankruptcy Judge  
DEBORAH HUNTSMAN, Court Reporter  
198 Broadway, Suite 903  
New York, New York 10038  
(212) 608-9053 (917) 723-9898



1

2 A P P E A R A N C E S:

3 STINSON MORRISON HECKER LLP  
4 Special Counsel for Reorganized  
Debtors

5 1201 Walnut Street  
Kansas City, Missouri 64106

6 BY: SARA E. WELCH, ESQ.  
(via telephone)

7

8 UNGARETTI & HARRIS LLP  
Attorneys for Kennedy & Associates  
9 3500 Three First National Plaza  
Chicago, Illinois 60602

10 BY: ALEX PIROGOVSKY, ESQ.  
(via telephone)

11

-and-  
12 DEAN POLALES, ESQ.  
(via telephone)

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1 Proceedings

2 (Whereupon, the following is an  
3 excerpt from 2/28/2006 in In re WorldCom,  
4 Inc., et al, case no. 02-13533.)

5 JUDGE GONZALEZ: You may be seated.

6 With respect to the first matter in  
7 WorldCom, Kennedy & Associates?

8 MR. PIROGOVSKY: Yes. Alex  
9 Pirogovsky on behalf of Kennedy & Associates.

10 MR. POLALES: With Dean Polales.

11 MS. WELCH: Sara Welch on behalf of  
12 the Debtors.

13 JUDGE GONZALEZ: All right. I am  
14 going to read a decision into the record.

15 \* \* \* \*

16 Before the Court is the Debtors'  
17 Motion for Order Nunc Pro Tunc Rejecting  
18 Agreement Between WorldCom, Inc. and Kennedy  
19 & Associates, dated August 5, 2005 (the  
20 "Motion"). The Debtors contend that if an  
21 executory contract actually does exist  
22 between the parties, the required standards  
23 have been met to grant nunc pro tunc  
24 rejection of a contract between Kennedy &  
25 Associates, Inc. ("Kennedy") and the Debtors

1                                Proceedings

2    as of the date of confirmation of the  
3    Debtors' Modified Second Amended Joint Plan  
4    of Reorganization Under Chapter 11 of the  
5    Bankruptcy Code, dated October 21, 2003 (the  
6    "Plan"). Kennedy argues in response that the  
7    relief sought by the Debtors would violate  
8    the Bankruptcy Code and additionally that no  
9    basis exists to grant the nunc pro tunc  
10   relief.

11                            The matter arose from proof of  
12   claim no. 23470 (the "Claim") that was timely  
13   filed by Kennedy in the Debtors' chapter  
14   11 cases. The Debtors objected to the Claim  
15   in their Twenty Second Omnibus Objection to  
16   Proofs of Claims (Employment Related Claims),  
17   dated August 4, 2004 (the "Claim Objection"),  
18   on the grounds that (i) the Debtors had no  
19   liability for the Claim and their records  
20   reflected that they did not owe Kennedy any  
21   money, and (ii) Kennedy had not provided  
22   sufficient information to support the claim  
23   or permit the Debtors to evaluate it.  
24   Kennedy responded to the Claim Objection by  
25   stating that the Claim was based on a certain

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2 Benefit Plans Consulting Services Agreement  
3 (the "Alleged Contract") for services related  
4 to consulting on and auditing of WorldCom's  
5 ERISA benefit plans. Kennedy asserts that  
6 the Alleged Contract was executory in nature  
7 within the meaning of Section 365 of the  
8 Bankruptcy Code. An unsigned copy of the  
9 Alleged Contract was attached to the proof of  
10 claim form, which also stated that the total  
11 amount of the Claim was "to be determined  
12 pending audit of prepetition and postpetition  
13 recoveries." The Debtors have, for purposes  
14 of the Motion, accepted Kennedy's assertion  
15 that the Alleged Contract is executory, but  
16 have not conceded that there is an existing  
17 agreement between the parties, or that such  
18 agreement is executory in nature.  
19 Additionally, the Debtors have reserved the  
20 right to commence an action seeking a ruling  
21 that (a) no agreement exists or existed  
22 between the parties, and (b) that any  
23 agreement between the parties was not an  
24 executory contract. This Court finds that  
25 the Debtors have failed to establish that it

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2     has the inherent, applied, or stated  
3     authority to grant post-confirmation nunc pro  
4     tunc rejection of the Alleged Contract, and,  
5     therefore, the Court does not reach the issue  
6     of whether a basis exists to grant the relief  
7     requested.

8                   The Debtors cite to Sections  
9     1123(b)(2) and 105(a) of the Bankruptcy Code  
10    as authority for the nunc pro tunc rejection  
11    of an executory contract subsequent to  
12    confirmation of a plan. Section 1123(b)(2)  
13    states that "a plan may ... subject to  
14    section 365 of this title, provide for the  
15    assumption, rejection, or assignment of any  
16    executory contract or unexpired lease of the  
17    debtor not previously rejected under such  
18    section." 11 U.S.C. Section 1123(b)(2).  
19    Section 105(a) provides that "[t]he court may  
20    issue any order, process, or judgment that is  
21    necessary or appropriate to carry out the  
22    provisions of this title." 11 U.S.C. Section  
23    105(a). The Debtors note that the language  
24    of Section 1123(b)(2) does not limit when  
25    assumption or objection must be effected.



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2     While this is true, the statute specifically  
3     states that the rejection must take place  
4     through a plan.

5                                Section 8.01 of the Debtors' Plan  
6     provides that executory contracts and  
7     unexpired leases were to be deemed assumed as  
8     of the Effective Date, except with respect to  
9     those contracts or leases that (i) had been  
10    previously rejected prior to the Effective  
11    Date, (ii) for which a motion for approval of  
12    rejection had been filed and served prior to  
13    Confirmation, or (iii) that were listed on  
14    Schedules 8.01(A) or (B) in the Plan  
15    Supplement. The Plan reserved the right of  
16    the Debtors to amend the Schedules on or  
17    prior to the Confirmation Date. However, the  
18    Plan contains no language reserving the right  
19    to either amend the Schedules or to seek  
20    rejection of contracts subsequent to  
21    confirmation of the Plan. Thus, the Plan  
22    itself has not provided the Debtors with the  
23    authority to seek post-confirmation rejection  
24    of the Alleged Contract, as is required by  
25    Section 1123(b)(2) of the Bankruptcy Code.

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2                   Additionally, Section 12.01 of the  
3 Plan contains several provisions relating to  
4 the Court's post-confirmation retention of  
5 jurisdiction. The Debtors specifically cite  
6 to the Court's retention of jurisdiction:

7                   (a) To hear and determine pending  
8 applications for the assumption or  
9 rejection of executory contracts or  
10 unexpired leases and the allowance of cure  
11 amounts and Claims resulting therefrom;

12                   (b) To hear and determine any and  
13 all adversary proceedings, applications  
14 and contested matters;

15                   (c) To hear and determine any  
16 objection to Administrative Expense  
17 Claims or Claims; ...

18                   (e) To issue such orders in aid of  
19 execution and consummation of the Plan, to  
20 the extent authorized by section 1142 of  
21 the Bankruptcy Code; ...

22                   (h) To hear and determine disputes  
23 arising in connection with the  
24 interpretation, implementation, or  
25 enforcement of the Plan, including any

1                                Proceedings

2                disputes arising under Section 5.12 or  
3                6.18 of the Plan; ...

4                                (l) To resolve any Disputed Claims;  
5                ...

6                                (n) To hear any other matter not  
7                inconsistent with the Bankruptcy Code; ...  
8                (Plan Para. 12.01.) The Debtors assert that  
9                nunc pro tunc rejection of the Alleged  
10               Contract would constitute an exercise of this  
11               Court's retained jurisdiction. The Court  
12               disagrees, and specifically addresses the  
13               retentions provided under sections 12.01(c),  
14               (l) and (n) of the Plan.

15                               The Court retains jurisdiction to  
16               hear and determine objections to claims under  
17               Section 12.01(c) of the Plan and to resolve  
18               any disputed claims pursuant to Section  
19               12.01(l) of the Plan. While the actions the  
20               Debtors seek to take under the Motion are  
21               tangentially related to a claim objection,  
22               they do not constitute an objection to a  
23               claim or the resolution of a disputed claim.  
24               Rather, the Debtors seek to create a set of  
25               facts (rejection of the Alleged Contract)

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2       that will ultimately enable them to take  
3       action to resolve the Claim or object to any  
4       additional claim that might arise as a result  
5       of the rejection of the Alleged Contract.

6                               Section 12.01(n) of the Plan  
7       provides jurisdiction for the Court to hear  
8       any matter not inconsistent with the  
9       Bankruptcy Code. Yet, rejection of the  
10      Alleged Contract under these circumstances  
11      would be viewed as inconsistent with the  
12      Bankruptcy Code. The rejection of executory  
13      contracts is provided for by Sections 365 and  
14      1123(b)(2) of the Bankruptcy Code. Section  
15      365(d)(2) of the Bankruptcy Code allows for  
16      rejection of an executory contract prior to  
17      confirmation, while Section 1123(b)(2) allows  
18      for rejection through a Plan. In this case,  
19      rejection of the Alleged Contract clearly was  
20      not sought prior to confirmation of the Plan  
21      and is not provided for in the Plan itself.  
22      Thus, to reject the Alleged Contract at this  
23      point in time would constitute an act that is  
24      inconsistent with those provisions of the  
25      Bankruptcy Code that permit rejection of

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2 executory contracts.

3 The Debtors cite to several cases  
4 as authority for the position that courts  
5 have utilized retained jurisdiction to grant  
6 nunc pro tunc assumption or rejection  
7 post-confirmation. These cases, however, can  
8 be distinguished from the situation at hand.  
9 The case of Alberts v. Humana Health Plan,  
10 Inc. (In re Greater Southeast Community  
11 Hospital Corp. I) 327 B.R. 26 (Bankr. D. D.C.  
12 2005), specifically states that "[t]he  
13 Bankruptcy Code permits questions of  
14 assumption or rejection under a plan to be  
15 determined after confirmation of a plan  
16 calling for such post-confirmation  
17 determination. Id. at 34 (emphasis  
18 added)(citing In re Gunter Hotel Assocs., 96  
19 B.R. 696, 699-700 (Bankr. W.D. Tex. 1998);  
20 TMS Assocs. v. Kroh Bros. Dev. Co. (In re  
21 Kroh Bros. Dev. Co., 100 B.R. 480, 486-87  
22 (W.D. Mo. 1989)). In the Greater Southeast  
23 case, the Plan had specifically retained the  
24 right for the debtors to reject the contract  
25 if the required cure amount was unacceptable.

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See

In re Greater Southeast, 327 B.R. at 30 ("The order confirming the plan slightly modified the plan by making the Humana executory contracts deemed assumed by the reorganized debtors as of the effective date of the plan, and by providing that the reorganized debtors ... could decline to assume the executory contracts if the cure amounts were unacceptable, with the executory contract to be 'deemed rejected' upon the reorganized debtors so declining to assume.") As previously discussed, the Debtors' Plan makes no comparable post-confirmation retention of such right. Similarly, in the case of In re Gunter Hotels, 96 B.R. 696 (Bankr. W.D. Tex. 1988), while citing to a general plan provision allowing the court to hear and determine all matters relating to the plan, the court's ruling to extend the deadline to reject a contract until sixty days after confirmation was made prior to the confirmation of the plan itself (and was presumably incorporated into the confirmation

1 Proceedings

2 order.) See Gunter Hotel Assocs., 96 B.R. at  
3 701 (extending the deadline for seeking  
4 rejection for 60 days past the effective date  
5 of confirmation). Indeed, the Court has been  
6 unable to locate case law on the issue in  
7 which some acknowledgment of the debtors'  
8 rights to act post-confirmation was not made  
9 prior to confirmation of the plan.

10 The Debtors also cite to several  
11 cases as authority for permitting the use of  
12 nunc pro tunc relief in the context of  
13 Section 365 of the Bankruptcy Code. However,  
14 these cases do apply in the post-confirmation  
15 context, as Section 365 of the Bankruptcy  
16 Code specifically relates to assumption or  
17 rejection "at any time before the  
18 confirmation of a plan." 11 U.S.C. Section  
19 365(d)(2). Furthermore, as pointed out by  
20 Kennedy, all relate to extension of the  
21 60-day deadline for unexpired leases of real  
22 property. As stated in the case of In re GST  
23 Telecom, Inc., 2001 WL 686971 (D.Del. June 8,  
24 2001), courts have recognized that Congress  
25 did not intend that debtors be granted only

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2     60 days in which to decide whether to assume  
3     or reject a nonresidential commercial lease,  
4     and equity dictates that courts can grant a  
5     debtor extensions to do so. Id. at \*3.

6                   When the Debtors structured the  
7     Plan to assume all contracts that were not  
8     specifically rejected, they took upon  
9     themselves the burden that certain contracts  
10    that they may not have been aware of or did  
11    not consider executory might not be able to  
12    be rejected if found to be executory. The  
13    Plan, however, did not include a reservation  
14    of rights allowing the Debtors to reject,  
15    post-confirmation (i) those contracts that  
16    were accidentally excluded from the  
17    Schedules, or (ii) those contracts that were  
18    not included in the Schedules because the  
19    Debtors did not consider them to be  
20    executory, but which are ultimately  
21    adjudicated to be executory contracts. The  
22    Debtors must therefore bear the burden of  
23    those contracts that were unidentified, or  
24    that are disputed in nature. While the Court  
25    acknowledges the Debtors' concern with



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2   additional creditors asserting that contracts  
3   against the Debtors were executory in nature,  
4   it is important to note that this opinion  
5   does not forestall the ability of the Debtors  
6   to challenge whether the Alleged Contract was  
7   executory in nature, or whether the Alleged  
8   Contract even existed. However, in light of  
9   the statutory language, the related case law,  
10   and the lack of any Plan provisions that  
11   would address this issue, the Court does not  
12   feel it is able to grant nunc pro tunc  
13   rejection of the Alleged Contract  
14   post-confirmation.

15                   Based upon the foregoing, the  
16   Motion is denied. Counsel to Kennedy is to  
17   settle an order consistent with this Court's  
18   opinion.

19                   \*       \*       \*       \*

20                   That concludes the Court's ruling.

21                   I think we need to move to the next  
22   pre-trial stage in the Kennedy & Associates  
23   matter, and I think when you settle the order  
24   you can put in a proposed date to continue  
25   the pretrial aspects of Kennedy and discuss

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2 with the Court any outstanding issues that  
3 the Court may need to address at that time.

4 The next comment I have is for  
5 Court Conferencing. Would the operator  
6 please --

7 MR. POLALES: Your Honor, are you  
8 moving to another case? This is Dean  
9 Polales.

10 JUDGE GONZALEZ: Yes.

11 MR. POLALES: Your Honor, we did  
12 have a motion to compel certain discovery. I  
13 don't know if Your Honor has had a chance to  
14 look at that yet, but that was argued in the  
15 same court appearance in which we were  
16 arguing the nunc pro tunc motion.

17 JUDGE GONZALEZ: I still think we  
18 need a status conference. I will look at  
19 that again. My recollection is that I waited  
20 on that to resolve this issue, and now that  
21 this issue has been resolved favorably to  
22 Kennedy, I may have to then address the  
23 discovery issue. It has been a while since I  
24 looked at that issue. I think what I would  
25 like you to do is set up the pretrial, and I

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2     will familiarize myself with the discovery  
3     issue and you can address it again at that  
4     time.

5                               MR. POLALES:   Thank you, Your  
6     Honor.

7                               THE OPERATOR:   Thank you, Your  
8     Honor.

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C E R T I F I C A T E

STATE OF NEW YORK       )  
                                  : SS:  
COUNTY OF NEW YORK     )

I, DEBORAH HUNTSMAN, a Shorthand  
Reporter and Notary Public within and for the  
State of New York, do hereby certify:

That the within is a true and  
accurate transcript of the Digitally Recorded  
Proceedings recorded on the 28th day of  
February, 2006.

I further certify that I am not  
related by blood or marriage to any of the  
parties and that I am not interested in the  
outcome of this matter.

IN WITNESS WHEREOF, I have hereunto  
set my hand this 7th day of March, 2006.

\_\_\_\_\_  
DEBORAH HUNTSMAN

AS CORRECTED AND MODIFIED BY THE  
COURT ON 2/28/2006

\*\*PROOFREAD BY HALLIE CANTOR  
\*\*PROOFREAD BY YA'AKOVAH WEBER